TRANSCRIPT OF PROCEEDINGS

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

October 29, 2009

IN RE: PETITION OF KNOX COUNTY PUBLIC DEFENDER	)))	Docket No.: 174552-2

APPEARANCES:

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BE IT REMEMBERED, the above-entitled cause came on for hearing this 29th day of October, 2009, before the Honorable Daryl R. Fansler, Chancellor of Said Court, when the following proceedings were had to wit:

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THE COURT: Good morning. Are we ready to proceed in the matter of the petition of the Knox County Public Defender?

MR. MOORE: Ready, your Honor.

THE COURT: All right. We are now ready. Very well. You may proceed, Mr. Moore.

MR. MOORE: Thank you, your Honor. Your Honor, I am Hugh Moore of the Chattanooga Bar appearing for Mark Stephens, the Knox County Public Defender.

With me today is Max Bahner from our firm, Aaron Love from our firm, and you know Mr. Stephens.

This case is about, at its core, it's about the right to counsel. It's about the right to counsel that is guaranteed by the Sixth Amendment of the U.S. Constitution and by the Tennessee Constitution.

Rule 13 of the Tennessee Supreme Court rules was designed to ensure that indigent defendants in this state receive the level of representation that was mandated by the constitution.

Rule 13, which is sort of at the center of this writ, is how the Tennessee Supreme Court decided to implement Gideon, the requirements of Gideon, and the other case law that defines an individual's right to have effective counsel.

And I think that's important. A defendant is entitled to effective counsel. A defendant is not entitled to win his or her case, but a defendant is entitled to effective, professional representation.

And that is what Rule 13 is set up to ensure. It's set up to ensure that each indigent

individual, who appears in front of the courts, receives an attorney who can provide that individual with representation that is effective and professional and it meets a certain standard that the Supreme Court has set.

And that is what we are here about this morning. Mark Stephens, who is the elected public defender for Knox County, his office is charged

with this responsibility. He has a first-line responsibility of providing this effective and professional representation to indigents here in Knox County.

Mr. Stephens brought the petition to Sessions Court. And in that petition, and the affidavit with it, Mr. Stephens says that he is fearful, that if something is not done about the caseloads in his office -- and he suggests that something be done about the misdemeanor caseloads; if something is not done about the extraordinary heavy caseload in his office, that his office would not be able, very soon, to provide the level of effective representation that Gideon and the other case law, the U.S. Constitution, the Sixth

Amendment, the Tennessee Constitution require, and that Rule 13 is designed to ensure, that every individual who appears has that representation that is guaranteed and mandated.

Now, we are keenly aware of the financial considerations here, but we don't think that's at issue.

Mr. Stephens' office has a constitutional responsibility. His responsibility is not to the individual courts; his

responsibility is to the individuals that he is appointed to represent, the men and the women who Mr. Stephens and his office is appointed to represent.

And as I said, Rule 13 sets out exactly how that mandate is to be applied. And Rule 13 has mandatory requirements.

We are here today and we are asking this Court to find, based on the record -- of course, this is on this writ of certiorari. The Court is bound -- we are all bound by the record and we can't add or subtract anything from the record.

But, on the record, we think -- very specifically, based on the June 10th, 2008 order of the General Sessions judges, we think that the public defender is entitled to the relief that he sought.

And what we are asking, is that this Court find that we are correct. And then what we are going to suggest, what we do suggest, is that the Court perhaps refer the matter then, back to the Sessions judges to work in consultation with Mr. Stephens and to work out some sort of a remedy that's acceptable to everybody.

Just briefly, to go back through the procedural history of this case, Mr. Stephens

filed a petition in Sessions Court. There was a hearing on June -- excuse me -- there was a hearing on June 10th, 2008, an all-day hearing, all sorts of witnesses. There was an order eight months after that.

In response to that order we then filed a petition for a writ with this Court. The writ was granted. The record was transferred up here.

There was then a motion to dismiss that was denied, and we are here this morning on the

merits of that.

What I want to do this morning is to briefly discuss our argument. Of course, we have filed a brief that sets forth our argument in detail, and I will briefly discuss that. I will explain why we think Mr. Stephens' office is entitled to relief and why the procedure that we have employed is an appropriate legal procedure.

And then second, I want to respond briefly to the two arguments that are raised by the state in its brief. They have raised two arguments in opposition to the relief here.

Those arguments are, first, that the remedy of a writ of certiorari is not available because Mr. Stephens had the right to take an

appeal.

And the second argument the state raises, is that the Supreme Court rules don't allow the office to seek an office-wide remedy; the remedy is only available to individual public defenders on a case-by-case basis. And I want to discuss that briefly.

First, just in passing, I want to note an error in the state's brief. The state asserts, at page 4 of its brief, that their motion to intervene remains undecided. And as the Court will recall -- and I have got a transcript page here for the Court.

THE COURT: I was under the impression, Mr. Moore, that you-all voiced no opposition --

MR. MOORE: We had no opposition, your Honor, and your Honor granted it and asked Mr. Diamond to prepare the order.

MR. DIAMOND: My mistake, your Honor.

MR. MOORE: Okay. And that's my -- let me start with Rule 13. I want to read two very short portions out of what is a very long rule. I also have a copy of the rule for you.

THE COURT: I have it.

MR. MOORE: Rule 13. I think it's

Section 1. It's (e)(4)(A). "When appointing counsel for an indigent defendant pursuant to Section 1(e)(3), the Court shall appoint the district public defender's office if qualified pursuant to this rule and no conflict of interest

exists."

Then down in section (D): "The Court" -- that is the appointed Court -- "shall not make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards."

I think it's important to note, first of all, the rule is mandatory. "Shall not make" the appointment once the requisit showing is made and the burden has been met.

And I think that, second, it's important to note that the rule itself speaks in terms of the public defender's office, not an individual public defender. It speaks of individual appointed attorneys and the public defender's office.

And it's the public defender's position,

in this case, that once the General Sessions Court made the determination that the number of cases

that were handled by attorneys in the public defender's office "violated professional standards," using that phrase in Rule 13, then the relief was mandatory.

That is where we get to the fundamental illegality; that is, that there is a factual finding, and then the ruling, relating to that factual finding, is not the ruling that should have been made based on those facts.

Now, in its brief the state concedes that the Sessions Court made a factual finding that professional standards were being violated by these misdemeanor caseloads.

I think this is a very important concession by the state. It's at page 13 of the state's brief. "The state agrees with the public defender" -- let me quote the state, because this is very important.

"The General Sessions Court apparently decided that the public defender had met his burden to prove that the caseload exceeded some professional standard." That's at page 13 of the state's brief.

It's important, because the state, in agreeing that the public defender met his burden -- that's the state's language -- they agree that the public defender had met the burden of making this clear and convincing showing that it was being compelled to provide representation that was not in accordance with the standards of Rule 13.

And that is the only burden that had to be met, that there was only one burden at issue in front of the Sessions Court, and that was: whether we could meet that burden of making that clear and convincing showing? And the state admits that we met that burden.

The public defender, at that hearing, and then as represented in the Sessions Court order, presented quantitative evidence of a qualitative problem. And it's true the presentation of that quantitative evidence of the qualitative problem, that Mr. Stephens had met his burden.

Now, I would submit to the Court that there is nothing unusual about using numbers of a quantitative measure in order to reach -- using

numbers, a quantitative measure, in an effort to reach -- and the quantitative measure here is the number of cases. There is nothing unusual about that, which the Supreme Court has used, in order to reach a qualitative result.

And a qualitative result, that the cases mandate and that Rule 13 was designed to ensure, is as I mentioned earlier, effective representation.

And the Supreme Court, in Rule 13, really anticipates that there will be quantitative proof, because it assumes from its very language that, at some point, one more case, one case, would result in a defendant not receiving legal services that meet professional and constitutional standards, because the rule says if you can show that this case, this one case, puts you at that level, that you have too many cases and you can't deliver effective representation. As Rule 13 says, adding the appointment, the one appointment, to the current workload.

Now similarly, for example, like in

state DUI law, it assumes that .08 is the level for impaired driving, whereas, depending on the size, weight, whatever individual alcohol tolerance of an individual -- really it might be

.6 for some and .10 for others -- but the law assumes, for the purpose of keeping roadways safe, it assumes this .08 level. And I think that's -- I have tried to come up with some analogy here, and it's roughly analogous.

The Supreme Court has said you can look at constitutional standards, you can determine, you know, in this individual case was there constitutional representation?

But then in addition to that, not necessarily over and above, but in addition to that, we are going to say you also can't have too many cases; you know, we are going to say, that at some point -- at some point that's just too many cases.

And the state mentions in its brief that one public defender -- and I think this is at page 12 in the state's brief -- one public defender, through hard work, intelligence, whatever, may

manage to provide quality legal assistance in spite of an overwhelming caseload.

And that is true. I mean, it's true, that if you ask -- the testimony from Ms. Poston and Ms. -- the two --

MARK STEPHENS: Murray.

MR. MOORE: -- Murray, the two assistant public defenders who testified in the Sessions Court hearing, was that, well, you know, yes, they just kept accepting the appointments, you know, the individual -- they were, you know, yes, you know, I think I can work that in. I think I can work that in.

But the -- you know, as much as the Legislature can establish this .08 standard for DUI, the Supreme Court has established this professional standards' limit for lawyers.

And through its opinion in the Baxter case, the Supreme Court -- and I have copies of those cases -- the Supreme Court, in the Baxter case -- and I have a copy for your Honor, if your Honor --

THE COURT: Very well. Just hand it to me.

MR. MOORE: Thank you. In the Baxter case, please, the Supreme Court says -- this is at the bottom of page 6, the bottom left-hand going to the right-hand part -- it says, "Trial courts and defense counsel should look to and be guided by the American Bar Association Standards relating to the administration of criminal justice and,

specifically, to those portions of the standards which relate to the defense function."

And as Professor Lefstein detailed in his affidavit, and then in his testimony at the Sessions Court hearing, he explains how these ABA standards, that the Supreme Court instructs trial courts to look to and be guided by, it says -- this is Judge Henry's opinion, more than 30 years ago. "Trial courts should look to and be guided by these standards."

And in his testimony and affidavit Professor Lefstein explains how these NAC numbers are, in fact, those standards.

Once the showing -- once we have made

the showing of the violation of the quantitative standards -- and we have shown that. And the state admits that. The state admits that Mr. Stephens' office made a showing in Sessions Court.

And the Sessions Court, in it's June 10th order -- and you know, really, because we are all bound by the record here. Looking in that order, it's sort of the center part of this case, in that order the Sessions judges said, we admit that, you know, you have proved a violation of

some professional standards here.

Once that showing has been made, and once we have met that burden, then we are entitled to relief. Just like the case that we cite -- what is it?

MR. LOVE: State versus Gant.

MR. MOORE: -- the Gant case, on fundamental illegality. It's cited in our brief, but the State verses Gant case. That's the case, your Honor, where a trial court judge had a hearing on the warrantless seizure of items from a

cell, a prisoner's cell. And the Court found that there was this warrantless seizure of items from the prisoner's cell, and then the Court ruled that that had to be excluded from evidence.

And that was taken up on a writ of certiorari. And it was found to be a fundamental illegality, because, based upon facts found by the Court, that it was a warrantless seizure from a prisoner's cell, the evidence was not to be excluded, although, the Court did exclude it. And here, we are saying, that this is very similar.

You have a finding by the Sessions Court that this quantitative limit, this quantitative measure of qualitative -- quantitative limit has

been reached, that it had been over-reached.

And therefore, the Court's conclusion from that was simply wrong. That is, what we are saying, is if you reach that conclusion, that is set out in the June 10th, 2008 order, the only result, looking at Rule 13, which is mandatory, the only result that can come from that is the relief that we seek.

And as I mentioned, the relief that

Mr. Stephens sought, in the original petition, was an end to further misdemeanor appointments until the situation can be remedied.

And as I said when I started the argument, I believe that, if appropriate, and the matter was referred by this Court back to the Sessions judges to work with Mr. Stephens, they could quite probably come up with some sort of a remedy that is satisfactory both to the judges and to Mr. Stephens' office.

Now, in its brief the state argues that these caseloads have decreased. And the state includes a table, I think, at pages 2 and 3 of its brief.

But what I would point out to the Court, is that the NAC standard -- and this is included

in Professor Lefstein's affidavit -- is 400 misdemeanor cases per attorney, per year. And I noticed, in subsequent studies the ABA made a recommendation that be reduced to 300 cases per year.

Mr. Stephens testified, and this is at

page 17 of the transcript of the June 10th, 2008 hearing, Mr. Stephens testified that he assigned four public defenders to the misdemeanor cases from which he is seeking relief.

The chart that the state submitted showed 5700 misdemeanor cases in 2007. That would be a little less than 1200 per attorney, which is more than three times the standard that the state concedes is being exceeded; that is, the state concedes that the standard of 400 cases is being exceeded here. It's being exceeded almost by three times.

Let me turn to the state's brief, briefly. In its brief the state raises two objections to the relief that we seek. I would submit that neither one of those objections is even correct or sufficient to overcome the mandatory instructions of Supreme Court Rule 13.

First, the state argues that this

fundamental illegality basis for a writ of certiorari, that we base this proceeding in front of your Honor on, is not available, because -- and then at page 14 of the state's brief, they state:

because an appeal is provided to the public defender by statute. Well, that's simply not true.

This Court held in its June 25th, 2009 order that -- I believe your Honor's language was it was abundantly clear that the Sessions Court order was not final because the judges said that we continue to look at these cases.

There is an appellate case directly on point, and I can provide a copy of that to your Honor. It's the case of State versus Osborne.

(Pause in proceedings.)

MR. MOORE: Thank you. State versus Osborne, Court of Criminal Appeals (1986) your Honor, over on the -- I guess the fourth page of that print, bottom left. The wording of T.C.A. 27-5-108 deems that "Before such an appeal" -- this is about appeals from Sessions Court.

"Before such an appeal can be taken there must have been a final judgment entered in

the General Sessions Court. An appeal under this

statute" -- that's the statute that allows an appeal out of Sessions Court -- "an appeal cannot be had for the review of an interlocutory order."

That's exactly what we have here. So I think the state's first argument, that we are entitled to an appeal, I disagree with that.

And I think, again, there is a concession by the state in its brief that's important. At page 7 of its brief the state concedes that a writ will lie for fundamental illegality, one, in the absence of an appellate remedy, and we believe here there is the absence of an appellate remedy, and two, where there is a plain and patent error.

And as I said, the state here conceded that the Sessions Court decided that the public defender had met its burden. We believe, in our view, it then becomes mandatory.

The other argument advanced by the state is office-wide relief; Mr. Stephens coming into the Court and seeking relief for his office is not possible and that the decisions have to be made, as the state says in its brief at page 17, out of one court, adjudicating one -- one court

adjudicating one individual case.

And as we noted in our June 6th, 2009 memorandum, that is not true. If that were true, then in Rule 13 the Supreme Court would not have referred, very specifically, to "appointment of the public defender's office."

All of the other references in Rule 13 are to individual counsel, but not the reference to the appointment of the public defender's office.

And there is a very good reason for this. In appointing the public defender's office, and not an individual attorney, the Court, that is, the General Sessions Court, the Criminal Court, that Court expects Mr. Stephens' office to handle the case. They don't expect the individual assistant public defender, or Mr. Stephens, whoever is there that morning, whoever happens to be appearing before the judge, that judge is not expecting that person to handle the case; they are expecting Mr. Stephens' office to handle the case.

And the office is appointed, so that Mr. Stephens, as the elected public defender, can

make the best use of the resources in his office in how he assigns lawyers to cases and to courts.

For that reason we think that the state is wrong when it asserts -- and this is at page 17 of the state's brief -- we think the state is wrong when it asserts that the Court must appoint -- this is a quote -- "a particular lawyer from the public defender's office to a specific case."

And then the state argues only this particular lawyer can apply for relief under Rule 13. But that just doesn't make any sense. And that's really not the way things happen in the real world.

Now, as I have said earlier, specific attorneys out of Mr. Stephens' office are not appointed specific cases, because he may have to decide somebody else needs to handle that case -- so and so is going on vacation -- that case is too complicated for you -- I mean, all manners of other reasons. And it's up to the office to handle the case.

Under the state's theory, these individual assistant public defenders would have to constantly appear back in front of the appointed judge saying, I am sorry, I am going to be on vacation the next two weeks, can this go to

this? Can you move the appointment? You know, please relieve me of the appointment and have this attorney appointed.

And that is not practical. It doesn't happen. That is why the office is appointed and that is why the office can seek relief.

This relief is being sought because Mr. Stephens' office is over-burdened. It's not being sought because one of the twenty or twenty-five attorneys in the office is over-burdened.

If just one of the attorneys, or two of of the attorneys in Mr. Stephens' office, are over-burdened, that's a problem Mr. Stephens is supposed to take care.

The Courts expect Mr. Stephens' office to handle the work. It's incumbent on him, likewise, to tell the Court, as he did in his

petition, when his office can't provide the effective representation that Gideon and the other cases, the Tennessee Constitution, the Sixth Amendment to the U.S. Constitution and Rule 13 are designed to provide.

Rule 13 sets out these standards where the public defender should not be appointed, and

Rule 13 contemplates when it is appropriate that the "office," rather than the individual lawyer, will be appointed; therefore, the Court has the power to determine that the office can't accept more appointments, not that John Doe or Jane Smith can't accept more appointments, but that the "office" can't accept more appointments.

Moreover, as a practical matter, and we have argued this earlier, if the public defender was required to accept these appointments on an individual attorney, case-by-case basis, and then make these arguments, the I-am-too-busy-argument, it would create an incredible burden on the Sessions Courts and the Criminal Courts, and the courts really wouldn't have much time to do

other -- to consider individual arguments by public defenders about their cases.

Furthermore, let me point out, nothing in Rule 13, or the statutes that govern the appointment of the public defender -- and there is some mention of this in the state's brief, I think, at page 14 and 15 -- nothing requires the public defender to be available to accept appointments in all courts.

Mr. Stephens' duty, and the duty of each

assistant in Mr. Stephens' office, is to the individual client, and it's a duty to provide effective representation to that individual client.

Mr. Stephens doesn't have a duty, statutory, constitutional or otherwise, to the Misdemeanor Division of Sessions Court; he has that duty to the individuals that he and his office is appointed to represent.

In promulgating and setting out Rule 13 the Supreme Court exercised, not only statutory authority, but really its inherent power to regulate the practice of law in the state.

We think there is clear authority for the relief that the public defender seeks; that is because Rule 13 requires that the office be appointed. It only makes sense that the "office" be entitled to ask for the relief that we have sought here.

In conclusion, let me say briefly, your Honor, the state has conceded the essential points that underlie our argument; that is, first, the state conceded in its brief -- and we quote this again: "The General Sessions Court apparently decided the public defender had met his burden to

prove that his caseload exceeded some professional standards."

Second, the state conceded that if there were no appellate remedy, and there is no appellate remedy here, that there was "plain error and the remedy of a writ of certiorari was correct."

We think the relief for the office that we have sought, and Mr. Stephens has sought, we think that complies both with the letter and the

spirit of Rule 13, of the law, of the law in Tennessee. We think it makes sense.

And finally, your Honor, we submit that the substantive relief requested in this writ of certiorari should be granted.

And as I mentioned when I started, we would suggest that the matter be referred to the General Sessions Court, sort of like you refer things to a master, but that it be referred to the Sessions Court, and Mr. Stephens, for them to get together, that's the people who are involved here, and to work out some appropriate relief that is satisfactory, both to the five judges and to Mr. Stephens' office.

Also, because the initial hearing in

this case was almost eighteen months ago, they may wish to have another hearing or get current facts. That's all, I think, very reasonable.

And like I said, we ask that -- we think that's an appropriate next step for this Court.

And that concludes my argument, and I am ready to accept any questions from the Court or the --

THE COURT: Let's hear from Mr. Diamond and then I may have questions for both sides, Mr. Moore.

MR. MOORE: Thank you, your Honor.

THE COURT: Mr. Diamond?

MR. DIAMOND: May it please the Court, I am Doug Diamond from the Attorney General's Office, here on behalf of the Attorney General in his official capacity, and the Administrative Office of the Courts.

Before I get into my argument I want to dispute a couple of supposed concussions that I made, at least their characterization by opposing counsel.

First, and this is one we have heard repeatedly in the argument just concluded, I am supposed to have conceded -- or the state is

supposed to have conceded that the public defender made a showing, by clear and convincing evidence, that his caseload violated professional standards.

And that's a little bit strong. What I actually wrote was: The General Sessions Court

apparently decided the public defender had met his burden of proof that his caseload exceeded at least some professional standards.

But I go on to point out that those are professional standards promulgated by trade groups that are essentially -- lawyer groups.

But the General Sessions Court did got find that the public defender's caseload exceeded these standards set out by our own Supreme Court in the Rules of Professional Conduct.

And then I went on to discuss constitutional standards. We don't concede that the public defender made a case for exceeding all professional standards; possibly for some.

The General Sessions Court made no finding by clear and convincing evidence. It's hard to tell quite what finding the General Sessions Court made. And I am only talking about, not what I am conceding, but what the General Sessions Court found.

Secondly, the other concession I am supposed to have made is that there is no appellate remedy; certiorari is correct.

Well, that's not true on a couple of levels. First of all, on the appellate remedy, I did not maintain that an interlocutory appeal is somehow -- or an interlocutory order is somehow appealable.

Instead, what I said in my brief, was that there is a statutorily prescribed, regularized appeal, and that there is nothing to prevent the public defender from having filed, right away in the Circuit Court, if he felt the order wasn't final by which -- this reading here -- nothing has prevented the public defender from filing a motion asking for a final order and going forward regularly with a statutorily prescribed appeal to the Circuit Courts.

Otherwise, any interlocutory appeal entered by a Circuit Court, that finds the evidence in favor of one side or another, but leaves something else unresolved, is open to appeal to this Court.

And as I pointed out in my brief, one of the cases, one of the very few cases to apply

writs of cert, says that's a big issue with these writs of certiorari; you don't want the exception to prove -- or to swallow the rule. And that is precisely the danger that this Court runs in accepting and deciding this writ for certiorari.

Instead, if anything, it should refer the case back for a final order and a regularized appeal; that is why the Legislature set out the appeal system that it has.

THE COURT: What authority do I have for that, Mr. Diamond? I mean, I know that I can refer the case back under a common-law writ. To the lower tribunal I can remand it for further action consistent with this Court's opinion, but what authority do I have to refer it back and order the General Sessions' judges to enter a final judgment in that case?

MR. DIAMOND: Because you certainly have -- even broad certiorari authority. I don't think there is any prescribed -- you have got wide authority on appeal to order the remedy necessary.

If somehow there is the conception that the General Sessions Court did not enter a final order, I think it's required to do so. It just

can't sit on an order, because that, in itself, is barring the other side from the right to appeal.

And there are certain cases just on that point, where clerks wouldn't accept notices of appeal, for instance. The Court below has to timely provide a right of appeal.

You can't just sit or enter a final verdict that basically denies the relief sought and sit there for ten years on an interlocutory order.

I think that writ of cert is available for that. And you can order, as the superior tribunal, be it an inferior tribunal, to prepare a final order, so that the appellant can file a regular appeal in the case. I think that's precisely what writs of certiorari are aimed at, among other things.

But there is a vast quantity of caseloads saying that if the lower tribunal, or its offices, prevent a regularized timely -- they say a speedy, timely, adequate appeal, that is exactly what a writ of cert is aimed at correcting. So you have ample authority to do

exactly that.

I also did not say that:if there is no appellate remedy then a certiorari review and

decision is correct. You have quote the absence of the appellate remedy and the fundamental illegality. And that will launch me to my argument, because we think both, that the public defender meet a standard.

When the public defender filed his petition in March of 2008, the public defender conceded that he was providing constitutionally adequate representation to his clients, both in the past and was continuing to do so.

He claimed, instead, a spective relief saying -- and he -- saying that further appointments might jeopardize his ability to provide constitutionally effective representation.

He based his petition solely on Rule 13 of the Supreme Court which says that the attorney should not be appointed if counsel can make a clear and convincing showing that had an appointment -- and it speaks in a singular, this

is an individual case, regardless of whether it's the public defender's office as a whole -- which I have no problem with that, the interpretation of the statute, or the individual lawyer -- that adding an appointment to the current caseload will prevent the counsel from defending the defendant,

a defendant, constitutionally and professionally in an effective manner.

Now, we moved to intervene after the filing of that petition; in fact, that was the case -- that was the proceeding in which our motion was never decided; in fact, the order isn't final from General Sessions. That's the reason, more than anything, that you had a non-final order.

Therefore, since we were not allowed to intervene, on June 10th, 2008 the public defender put on a massive, voluminous, but one-sided case in favor of his petition.

The problem was this. While his case showed that he was perhaps not meeting -- or had a caseload in excess of some professional standards promulgated by national trade groups, he did not

show or even allege that he was providing constitutionally ineffective representation.

And in fact, his on figures -- and he was the only person submitting evidence, the only party to the case. His own figures show that his overall total caseload dropped dramatically.

In 2006 he had 15,240 cases. And I am referring to the tables on page 2 and 3 of my

brief, which I think are what guided the General Sessions Court in a collateral proceeding with the Criminal Courts in this matter. So he had 15,000 cases in 2006. In 2007 that dropped to 13,204. In 2008, 11,511.

That's a 25 percent drop nearly, in the three years that he had. Similarly, he had a declining case caseload, expressed in percentages, between '06 and '07: 10 to 14 percent in '06 and '07. And those were the only figures available, because this was partly through '08.

His caseload dropped 10 to 14 percent in Sessions Courts. Twenty-five to thirty percent in the Criminal Courts. That is a marked drop.

I just don't see how the defendant can claim that he is currently supplying constitutionally ineffective representation, that his caseload is dropping, that he then can't continue to provide, what he has been doing all along, a higher caseload. It doesn't make logical sense.

Now, for some time nothing happened in Sessions Court. And perhaps for that reason the public defender petitioned in Criminal Courts to be relieved from representation there as well.

And they are not in the record, and they are not part of the Sessions record, I don't believe. But I think that they are important to this case, because they tend to show why Sessions Court wanted to go with this case rather than the Circuit, which was already skeptical of his petition.

And I would like to move this Court for permission to enter the filings and the orders of the Criminal Courts into the record in this case. I think you can probably take judicial notice of them; they are certainly up on the public

defender's website, widely available and public knowledge.

The public defender withdrew that Criminal Court petition, after a fairly skeptical hearing, in the fall of 2007. Of course, in -- or 2008; excuse me.

MR. MOORE: Your Honor please, I am going to object to a discussion of something that is outside the perimeter here. A writ of certiorari is clear --

THE COURT: I would have to sustain that. I can't -- even if it's something I can take judicial notice of, it's not part of what was

before the underlying tribunal, Mr. Diamond, and I don't think I can consider it in this case.

MR. DIAMOND: Thank you, your Honor. The Sessions Court order went down in February of 2009 and, of course, we followed with a writ of certiorari to this Court.

This Court needs to bear in mind a writ of certiorari is an extraordinary remedy; it is extremely limited in its scope.

As now Justice Coch said, in Robinson versus Clement, Courts may not inquire into the intrinsic correctness of the inferior tribunal's decision, two, they may not reweigh evidence that support an inferior tribunal, and three, may not substitute a judgment for that of the inferior tribunal.

You know, there is -- this is our remedy, an exceptional remedy. There is an even more rare exception to the general rule a superior court may not inquire into the intrinsic correctness of the lower court decision, and that's the so-called "fundamental illegality rule."

It's rarely used. In State versus Johnson, I think the Court explained it fairly

well. The Court below had suppressed evidence that the state wanted to introduce in a criminal case. The ruling was clearly against the law and it had the effect of fundamentally killing the state's case. And as the ruling was interlocutory in nature, the state had absolutely no right to appeal.

The Supreme Court ruled a petition for certiorari was appropriate in that case. And now it's a fundamental illegality exception.

And here is the two things that we need to invoke that very rare exception, one, a plain and patent error, and two, that, has got to be coupled with the absence, the absolute absence in this case of an appellate remedy.

And that is true of every case that is applied to this doctrine, a total absence and preclusion, not just an interlocutory order with eventual appealability to be pardoned, but an absolute lack of appellate remedy.

The public defender can point to only four modern cases in which the fundamental illegality exception was applied. And Tennessee's appellate courts venture to enter into this very circumscribed arena. And they all relate to only

one issue: expungement.

Therefore, in Adler, from a trial court, and this is the first of the series of four cases, the trial court had expunged a criminal record,

and the state was precluded by the Rules of Appellate Procedure from ever appealing that court's record. The court accepted the appeal as a writ of certiorari, because the court for the state was absolutely precluded from appeal.

As I mentioned earlier, they have to look at another factor: was there a fundamental illegality? And the appellate court said, no, there was not.

Then Gifford followed Adler. It's basically the flip side. Here, we had a defendant who was denied expungement, and again, under Rule 3(C) of the Rules of Appellate Procedure, had no way to appeal the adverse decision, ever. It wasn't just an interlocutory order. It was, as to him, a final bar-the-door.

The Court accepted the petition. And here, unlike the -- illegality, the trial court had refused expungement to a defendant who had pled guilty, but the statute didn't preclude people who pled guilty from expungement, only

those who were convicted by the trial court. There was never a conviction. So the statute

doesn't apply.

You almost, as a ministerial matter, have to grant expungement if the party meets the standards of the statute.

Scates, again, very similar to Gifford, no other right of appeal. The trial court blatantly violated the law requiring, also as a ministerial matter, expungement, when no true bill was returned. And no true bill was returned in that case. The case was dismissed.

And "Robinson" is the final case, the same as Gifford and Scates: no right of appeal to a defendant. The trial court denied expungement on a contempt matter holding contempt was not a crime that could invoke expungement.

The Court, thus, said no. Contempt is a crime. It's a misdemeanor. Therefore, if you show that you were found innocent of this crime, or otherwise the case was dismissed, as a matter of absolute right, ministerially, the trial court has to grant the expungement.

Thus, in modern application, this fundamental illegality exception has been applied,

and only one classification, which obviously we don't have here, an expungement -- and has had two prerequisites, absolutely no possibility of appeal, not just an interlocutory, non-appealable order on its own, but no possibility of appeal.

And secondly, the Court's ruling is pretty much ministerial. It's not a matter of weighing evidence. There is no dispute about evidence. You either come in with a piece of paper showing what the disposition was of your criminal matter and, based on that piece of paper, you either do or do not have expungement. It's not a matter of debate or the weighing of evidence.

The public defender in this case meets neither of those prerequisites. Rule 13 requires a lawyer or an office to make a showing that an appointment would violate his ability to provide professional and constitutional standards.

They can't just sit on professional standards, which is what the public defender is trying to do in this matter; you have to look to constitutional standards as well.

And that is why I said in my brief you can violate -- you can have a caseload that exceeds professional standards but still is within constitutionally effective representation. In fact, that is precisely what the public defender has necessarily said has been going on all along. He had higher cases in the past. He says he is providing constitutionally effective representation, so therefore, he is living proof that you can have caseloads that may violate some professional standards, yet do not preclude the provision of constitutionally effective representation.

And that is what the General Sessions Court found. They applied both words. Words have meaning; they are not put in there for no reason by the Legislature. You have got to show not only professional standards violated, but constitutional standards.

The General Sessions Court applied the rule and they weighed the evidence. They said apparently some professional standards had been exceeded. The public defender may have proved

that much, but -- and they are certainly in a position to know, because he was prefacing in front of them on a daily basis, in addition to the pleadings, they certainly could take judicial

notice of the performance of the public defender in their courts. They said that the public defender had not proven that his caseload exceeded constitutional standards.

And while they didn't allude to it directly, I think it was because of the numbers that we put into a chart. We compiled his on numbers that showed dramatic caseload drops.

You can't say I am providing constitutionally effective representation at fifteen thousand cases, I am now at ten, but I can't take more or I won't be able to provide the same representation I could at fifteen thousand. It makes no sense.

Moreover, the public defender was not precluded from appeal. And I am not saying that the order was appealable. I believe it was. But this Court has ruled differently, and I am

prepared to accept that. That doesn't mean that the public defender could not have applied for a final order; people do that all the time. And I said General Sessions can make it final.

Instead, he chose to plead to this court, perhaps because he didn't want to go back to the General Sessions or to the Circuit Courts

under the regularized set of standards provided by statute.

What he is trying to do here is short circuit an ordinary writ of appeal. There is nothing to prevent him from having asked for a final order. If that had been denied, he might have a better chance of coming to this Court.

Because the public defender has not shown any fundamental illegality, he is basically asking this Court to reweigh the evidence and find not only that --

THE COURT: Let me assure you I won't do that, Mr. Diamond.

MR. DIAMOND: I know you will not.

THE COURT: They either have -- and if I understand your argument correctly, you are saying

that it was a failure of proof in the General Sessions Court, because he didn't prove both --

MR. DIAMOND: That is right.

THE COURT: -- the inability to provide constitutional representation and professional standards.

If I understand your argument correctly, and the other side has argued differently, if they are correct and you are wrong, I only have to

prove one, then we are in a situation where at least the General Sessions Court's satisfaction is that professional standards have been exceeded. Then the question is: what should they have done once that finding was made?

MR. DIAMOND: I think there is a little more nuance than that, your Honor, because the standard is not just national professional standards; it's just professional standards.

The Sessions Court didn't find, again, that he has exceeded the Supreme Court standards, our very own rules, not some trade group standards, but what are applicable requirements

under the rules of the Supreme Court.

But I don't want to go into debating that too much, because I think you have got the nut of the argument there certainly.

I think that precludes certiorari under -- due to the general rule or the fundamental illegality exception.

But I do think, if you want to really look at where you have got certiorari jurisdiction in this case, just the general rule provides you ample, ample reason, to question whether the General Sessions Courts exceeded their

jurisdiction.

General Sessions Court is limited to jurisdiction over proceedings expressly provided for by statute, that's Caldwell versus Wood, a case I cited and attached to my brief.

The only statute, rule, or authority invoked here is Rule 13. And I don't care whether you characterize it as an office of lawyers or a lawyer; that is sort of a red herring argument.

It is clear from the language in Rule 13 it's talking about individual cases. It does

not -- I am not aware of any other proceeding, in this state's history or in case law, that has interpreted Rule 13 to provide to the public defender a right to have a panel, not just an individual judge, but a panel of General Sessions Court judges, sit en banc and grant perspective indefinite relief to the public defender to withdraw from courts.

If anything, the public defender here is really inviting the General Sessions Court to invade on his own authority, which is to allocate his own resources. And we have cited cases, that part of an administrative officer's discretion and authority is to take the resources, which he or

she is provided, and assign them accordingly to what he is given.

And to ask a Court to cover an administrative decision with the imprimatur of a court order is bad public policy. It's involving the courts in what is essentially a political and administrative issue.

I am not sure what -- the AOC, I am

sure, wouldn't be happy about it. I am not sure -- and we thought about it, what we could do if the public defender was simply to announce, I have been given X number of resources by the Legislature, I have looked at my caseload, I have got discretionary ability to sign whatever -- what few resources I have been given wherever I like, I am going to assign X number of lawyers to the X number of courts.

And I don't know. We could try a mandamus, I guess, but I think that would be a pretty tough row to hoe. I just don't -- I think it would be very tough, I will have to concede that. We might be successful, but -- even so, that's an administrative decision, and I don't think he should be running -- or cover a court order to a decision that is really granted to him

to allocate his own resources. That's up to him.

And courts really have no business interfering. And it's odd that an administrative official would ask a court to come in and essentially stick a court order on top of his own decision and cover it with the imprimatur of a

court. Let the public defender decide his on cases -- or decide his own resources; excuse me.

So if you are going to grant a writ of certiorari, I think it's a lot easier, rather than trying to find this exception within the exception that's implied -- they don't apply to the modern days -- and only four cases, having no relation to this case, with no authority for any proceeding such as this -- I think it's a lot easier to look at the General Sessions Court case and say there is no authority for a General Sessions Court to convene five judges in a panel to sit en banc, to decide, not an individual defendant's case, but to grant to an entire administrative office, relief.

Perspectively, that permits that office to pull out of a class of case or a class of courts indefinitely with no antedate sought.

I just think that's well beyond the scope of the General Sessions Court's authority.

And probably the decisive factor of this case, if this Court should do anything on a writ of cert, it should simply vacate proceedings below and

dismiss the petition. Let the public defender make his on decisions; that is why he was elected.

THE COURT: A couple of questions, if you are finished; I'm sorry.

MR. DIAMOND: I am.

THE COURT: All right. Let me take what I perceive is the situation in this case. And just bear with me for a moment.

MR. DIAMOND: Sure.

THE COURT: Let's presume that the public defender has carried the burden by showing that the professional standards have been exceeded.

MR. DIAMOND: Yes.

THE COURT: You have argued the Adler case regarding the expungement order, the comments that it essentially is a ministerial function of the judge at that point.

If I read Rule 13, and with those presumptions I have asked you to bear with me on for just a moment, if the Sessions Court found -- and I will use your argument -- if the Sessions

Court found that an additional appointment would

prevent counsel from rendering effective representation in accordance with constitutional and professional standards, if they made that finding, what choice would they have but to refuse to make the appointment?

Because the rule, which has the force of law, says the Court shall not make an appointment. I mean, there is no discretion. I mean, it's nothing but ministerial. They have to go to someone besides the public defender's office.

MR. DIAMOND: In an individual case, only if the public defender shows, by clear and convincing evidence, not only professional standards, which you have asked me to assume, and I will, for the purposes of this question --

THE COURT: Right.

MR. DIAMOND: I hope I am following your question --

THE COURT: All right. I even took it further. I said assume that they found that they both were exceeded.

MR. DIAMOND: Uh-huh, because he has got to show also that this would prevent him from providing constitutionally effective

representation. That's precisely what his own --

THE COURT: Well, I muddled that up when I said "clear" on you.

MR. DIAMOND: I understand.

THE COURT: Let me just presume for a moment that the Sessions Court had, in this hearing, said okay, we find that the public defender has proven, by clear and convincing evidence, that the additional appointments would prevent counsel from rendering effective representation in accordance with constitutional and professional standards. Let's accept your argument. I will do that. I will accept yours instead of theirs.

If I accept your argument, and they had made that finding, then they would have to refuse to make the appointment.

MR. DIAMOND: I agree.

THE COURT: And to insist that the public defender take the appointment would be a fundamental illegality, because --

MR. DIAMOND: Yes.

THE COURT: -- they are ignoring a clear rule that has the force of law.

MR. DIAMOND: I think you are right in that distinction you are making.

THE COURT: Okay.

MR. DIAMOND: And I apologize I didn't convey that clearly. It's been --

THE COURT: All right. Good.

MR. DIAMOND: Yes. We think he has to prove both. And he, in fact -- his own -- prove both.

And I will also mention, in terms of exceeding his jurisdiction, or acting illegally, the Court never did decide our motion to intervene.

So all we saw was one side's proof. I had no opportunity to test that proof. And that's concerning as well. Because this is -- it's a proceeding -- it's a judicial proceeding that presents as an adversarial proceeding. We got one side of the picture.

But I think we don't need to go there,

particularly, because I think the public defender's figures seal his fate, and he did it in the General Sessions Court with these five judges who sit and watch the performance of the office every day, who have read the pleadings and have

read the rule, understood those two prongs, professional and constitutional, the duty had from both, not in there -- they are in there for a reason. They said, yeah, we'll assume with you. Professional? Yeah. Constitutional? No.

If you start looking at "constitutional," you start reweighing the evidence. And I know you are not going to do that.

But in order for you to get to constitutional, there is only one way you can do it, and that's to reweigh the evidence. And I think that's what this is, is a fairly -- disguised attempt to ask this Court to do just that. And I know you will not.

THE COURT: In regards to that, the issue, as far as I see it, is either Rule 13

requires both or it does not?

MR. DIAMOND: Well, if that's the issue you see, we'll perfectly happy to live with it.

THE COURT: Well, that's it. There is no reweighing whether they met their burden on the constitutional --

MR. DIAMOND: We agree.

THE COURT: I live with what they said,

whatever it is. All right. Mr. Moore, I do have a couple of questions.

MR. DIAMOND: Thank you.

THE COURT: If you wish to respond first, then I will --

MR. MOORE: Yes, briefly, your Honor, on a couple of points. I don't think Rule 13 does require both. If you read it to require both, it reads the professional standards out of the rule.

It means then that just the constitutional standards trump everything; that is, you can violate all of the professional standards of the world, but not until you violate the constitutional standards is there a violation of Rule 13.

The Court wouldn't have said "both," if the word "professional" standards was to be meaningless.

And it would be meaningless under the state's arguments, because the state surely is not arguing that you could -- that you could provide representation that met professional standards, but was unconstitutional, and that that would be okay.

And surely I don't think they are -- I

mean, they each have to mean something. And under the state's reading then, the word "constitutional" trumps everything.

Proving a violation of professional standards doesn't mean anything. You proved a violation. You know, so your violating a professional standard doesn't make any difference.

If it's constitutional, then you are okay; you know, you have to go ahead and take the appointment.

So I very seriously don't believe that the Court intended to write in Rule 13, as

your Honor read, adding that appointment would prevent counsel from rendering effective representation in accordance with constitutional and professional standards and then mean to have half of that be meaningless.

Briefly, on one other point, the reference -- I think there were three or four references in here to these numerical standards from the NAC being trade group standards.

And again, I would just refer the Court to Justice Henry's opinion in the Baxter case. The Supreme Court said, Trial Courts should look to and be guided by the American Bar Association

standards relating to the administration of criminal justice.

It's not like the, you know, the National Association of Stove Manufacturers. I mean, the Supreme Court says that's what you are supposed to look at. You are supposed to look at those standards in making your determination.

Very briefly on another point, without going back and asking the Sessions Court to enter a final order, well, when you think about that,

the order here was not -- it's not like they left off an assessment of cost or didn't make a Rule 54.02 finding.

The fundamental order is: we thought about this, we heard your hearing, we held this for eight months. The Court held it for eight months before issuing the order and, after eight months, they issued this order that said, you know, we find that you proved that you didn't meet professional standards, but we are going to keep looking at this, and we'll look at it -- I think it says, every quarter.

So it's not like I am just going back and saying, excuse me, you forgot to assess cost in that, or excuse me, you have got more than one

party here, you need to put the Rule 54.02 magic language in it and you'll have a final order and can take an appeal on it.

You would be going back and asking the Sessions Court to completely rethink the decision that they made after eight months of thinking about it. And it's not simply a ministerial

matter.

I think those are the only points I want to make in response, so I am ready to respond to any of the Court's questions.

THE COURT: All right. Mr. Diamond has questioned the General Sessions Court's authority to sit en banc and issue this order. If it is not an adversarial proceeding -- I think, in the transcript, in response to his motion to intervene, they said it's not an adversarial proceeding.

MR. MOORE: And I believe they offered him an opportunity to cross-examine.

THE COURT: But anyway, their intent was that it not be an adversarial proceeding.

MR. MOORE: Yes.

THE COURT: It seems to me like it's more an informational-gathering process on the

part of the judges, and then they put down this order.

And from day one I have been struggling with what this animal is I am dealing with, Mr. Moore.

I don't have an adversarial proceeding. I don't have an administrative board. I have got five judges, with no particular case, sitting en banc, issuing what you would perceive to be an administrative order. And I am not sure what they have created there.

Mr. Diamond pointed out in his brief that the General Sessions Court judges don't even have statutory authority to amend their own judgments once they become final.

There is no Rule 60 motion in Sessions Court. He says you can ask them to make a final judgment. I don't know of any 54.02 being in Sessions Court --

MR. MOORE: Right.

THE COURT: -- how they can make a final judgment on part of a case. But likewise, I am not sure what they have done here and what I am being asked to do with whatever they have done here.

MR. MOORE: I'll certainly agree with your Honor that this is, in part, unchartered

territory, and that would be -- Mr. Stephens didn't ask the Sessions' judges to hear the cases en banc.

The petition was filed. Obviously some thought was given to what do you do? What do you do to have it, have Rule 13?

You know, rather than have John Smith and Jane Doe come in each day with all sorts of witnesses and say, our office can't do this, you know, and do that in front of, you know, Judge Jackson and each of the -- Judge Emery, each of the judges down there -- what do you do? What do you do? And so we thought, well, let's file a petition.

The Court decided to hear it en banc. And quite frankly, just as an attorney, and this is not in the record or relevant to anything, we didn't know whether we were going to get five orders or -- you know, we didn't know.

The Court decided to hear that. And then the Court, after eight months of thinking about it, decided to issue that joint order signed by all of the judges.

So I think, with the intervention of the state here, which your Honor allowed, and we don't object to the state intervening or being here, I think it is an adversarial proceeding.

I believe that it is an adversarial proceeding. We are saying Rule 13 was violated; the state is saying that it wasn't. I think that's adversarial. I think that that presents a controversy for your Honor, for the Court.

THE COURT: Well, Mr. Stephens is not the first public defender to ever seek relief from appointments. I am aware of at least one case out of Florida where the public defender there filed a -- objected to the appointment and obtained orders in five different -- I won't say courts -- let's say "divisions" of a court. And they were consolidated for one judge to hear them. Certainly that would have made a better proceeding, because you have an actual pending case.

But the problem I have, is I don't even know if Sessions Court has a pending case with this petition.

MR. MOORE: Well, I mean, we are

aware -- I mean, certainly we are aware, in working with Professor Lefstein, who is, I guess, one of the nation's top experts on this area of the law -- and we are aware of those cases, of cases in Louisiana and Missouri and different places. In thinking it through here, this just appeared to be the best forum to proceed.

His problem was with, as the evidence in the Sessions Court transcript, and in Mr. Stephen's affidavit, in his quite lengthy testimony there, it shows that he thought about it.

And then going back to what I was arguing about earlier, it's up to him to run the office; you know, he has got to figure out what do I do with these twenty-four or twenty-five assistants? How do I handle all of this most appropriately?

And he believed that he could get -- looking at all of the numbers, he could get temporary relief from misdemeanor appointments in Sessions Court.

And he set out in great detail what that then would let him do. It would let him assign additional attorneys to the Criminal Courts, it would let him assign additional attorneys to

Felony and DUI parts of the Sessions Court. And that's what he thought, and that was the relief that he -- so, I mean I -- do I think we have an adversary proceeding in front of your Honor? I do think we have an adversary proceeding.

THE COURT: Well, obviously you do now; down there you didn't, necessarily --

MR. MOORE: Right.

THE COURT: -- which is -- I mean, we didn't have Jones versus Smith down there or State versus Smith --

MR. MOORE: No. And we didn't object to the state intervening down there. I mean, now I am glad they have the AOC represented here.

The whole aim of our proceeding, which started almost two years ago working on behalf of Mr. Stephens and his office, is to try to find a solution to a problem. And we have tried.

And I don't want to get into anything

extrajudicial here, but I mean, we have tried at various levels to find a solution to the problem.

And certainly, taking a petition to the Sessions Court, was not the first line of attack of the problem, but it seemed to us to be appropriate at the time. It seems to us to be

appropriate, perhaps even more appropriate now.

We presented evidence to the Sessions Court that the Sessions Court found. It said we were right. I mean, the Sessions judges said you are right; you proved that you are violating these professional standards.

And it's not like the professional standards -- as I mentioned -- and I have these AVA reports here, I think, Judge --

THE COURT: I think you attached them.

MR. MOORE: It's not like the standard is 400 cases and you have 401. The standard is 400 cases and his office has 1200 per lawyer.

He saw it decrease by 15 percent or 20 percent. I mean, he still is -- and Professor Lefstein, in his affidavit, and

particularly in his testimony to the Sessions judges, was quite eloquent in explaining what happens when you have a situation like that.

When you have a situation like that -- and Ms. Murray and Ms. Poston, who testified -- and of course only two assistants testified. But then the Sessions' judges agreed on the record all of the other assistants who were in the courtroom that morning, the Sessions judges

agreed on the record that their testimony they stipulated, accepted a stipulation the testimony of the other twenty-two or twenty-three assistants would be just the same as Ms. Poston's and Ms. Murray's testimony.

And so, what they were saying, was I don't have time to do this; you know, I am seeing people 15 minutes. I am not interviewing witnesses. I have worked with Professor Black in the clinic and I learned how to work up a case. Now I have got to work in Mr. Stephens' office and I find that I am appointed to, you know, 25 cases one day and I can see people out in the hall.

And it's not the way I think a case

ought to be tried. What Professor Lefstein testified to, and it's in his affidavit and in his testimony, that the end result of this is quite -- I mean, I guess I can't say certainly -- but his testimony is quite probably, almost to a certainty, the end result of this, is people are pleading guilty to things that they are not necessarily guilty of, just because that's the system.

And as I said, the issue here is the effective representation of these individuals,

each man, each woman, who goes out there on Liberty Street and goes into the office of the public defender: are they receiving effective representation?

Are they receiving -- and can -- that is why the state's Supreme Court said professional and constitutional standards. It's why to ensure safety on the roads. We have a speed limit law. If I am driving back to Chattanooga, and I go over 70 miles an hour, I am violating the law.

No matter what excuse I have, I am

sorry, I was in a hurry, there was nobody else on the road and I couldn't see anybody, over 70 miles an hour violates the law.

Also, there is a reckless driving statute that is subject -- if a state trooper sees me, and I am talking on a telephone weaving all over the place and running off on the side of the road, doing whatever, and driving 60 miles an hour, that's a violation of those standards.

The state trooper can arrest me for violating the quantitative measure: I am just going too fast or, the qualitative measure: I watched you drive, you need to get off the road. For whatever reason you are driving recklessly.

That's why the Supreme Court here said professional and constitutional standards. Constitutional is subjective. Are you providing constitutional representation to those people?

But the professional standards? I think the professional standards -- and I think that is why the Supreme Court let -- you know, it's not a laundry list. Its professional standards encompass, of course, the code of ethics. It's in

the Supreme Court rules.

But those professional standards also, in looking back to the Baxter case, very specifically encompass these numerical standards, where the Court is saying, okay, you have got 24 hard-working people out there, who are doing their dead-level best -- as Ms. Poston and Ms. Murray testified -- to provide constitutional representation to everybody, but we, as the Supreme Court, are going to say, that you -- if you can show to us that you are being over-burdened, to the extent that these recognized professional standards, standards recognized in the Baxter case, are being violated -- and as he showed, his attorneys, we are not arguing a close case. Not 401. Not 420. It's 1200 on a standard

of three hundred or four hundred, if you can show that too. That is why we put professional and constitutional in the rule.

THE COURT: Well, there is no question, based on the evidence before the General Sessions Court, that the number of cases that the public

defender's office is assigned per year is far greater than the standards that were presented to the General Sessions Court judges.

As I think Mr. Diamond agreed, the issue is: whether both constitutional and professional standards have to be met or if it's one or the other?

If both have to be met, then there is nothing in the General Sessions opinion -- actually the General Sessions opinion is that constitutional standards were being met --

MR. MOORE: Yes, your Honor.

THE COURT: -- and the professional standards were not. If you have to have both, that's the end of it. If you only have to have one, then Rule 13 says they shall not appoint. And they found one.

The problem I have in this case -- and I am going to invite you-all to brief this again. I

think you recall when we first started on this I said why do I have this case?

MR. MOORE: Yes, your Honor. I recall that very first time we were here in front of you.

THE COURT: There are important issues here and important issues regarding effective assistance of counsel.

It's been a long time since I was in General Sessions Court, but I recall three ways that you started a proceeding down there: a civil warrant, a criminal warrant, or a citation by an officer -- that's either a criminal or a civil citation. I guess that's four ways.

What I don't want to happen, is that we take this case -- and we have spent a lot of time on it. I can assure you that I, and a very abled assistant, have spent a lot of time on this case.

I don't want this to get to the Court of Appeals or to the Supreme Court and somebody says there was nothing here that was subject to the writ of certiorari, that there was no proceeding, no lawful proceeding in the General Sessions Court because there is no creature such as a petition.

And before we go any further I think -- I mean, I have been inviting this discussion of

how do I get this case, with this proceeding,

whatever it is below? And Mr. Diamond has brought it up, with the question of the legality of what they did, whatever it is, in General Sessions Court.

And I think that we really need to hone in on this issue and I am going to invite both sides to brief this further. And I would like to have them within 30 days, that this needs to be brought to a conclusion.

MR. MOORE: Your Honor, I mean, we'll --

THE COURT: I think if I can come to grip with what I am wrestling with here, I can deal with this case straight away.

MR. MOORE: So what your Honor would like is a brief on procedurally --

THE COURT: The two issues: whether or not what we had is -- there has been a lot of talk about whether it's appealable or whether it's subject to a writ. I am not sure it's subject to anything, is what I am saying. I don't know that it's appealable or subject to a writ of certiorari, regardless of the form of the order.

MR. MOORE: All right.

THE COURT: And secondly, this en banc

order that they issued, I am not sure what that is, to be honest with you. I know the Sixth Circuit can do that.

MR. MOORE: Well, I mean, it appeared to us that it could be an individual -- that it could be -- it's signed by all five judges --

THE COURT: Right.

MR. MOORE: -- and that it could be --

THE COURT: Well, that's the nature of an en banc order --

MR. MOORE: Right, that exact order -- I mean, like five orders combined into one. I guess that's --

THE COURT: Now it's consolidated, I guess.

MR. MOORE: Right. That was one -- five. But yes, we look forward to the chance to brief it.

MR. DIAMOND: Your Honor, if I may? I think, because this is a jurisdictional issue -- I have addressed it, I don't think the other side particularly has -- it's hard for me to write -- it's really their burden to prove some kind of

subject matter jurisdiction.

THE COURT: Jurisdiction --

MR. DIAMOND: -- and therefore -- and I don't know what you had in mind, but for each of us to submit briefs in 30 days, he needs to go first.

THE COURT: You have a good point. The jurisdictional issue is the petitioner's burden in that.

MR. DIAMOND: Right.

THE COURT: So I will ask them to submit something within 30 days. And you have already started on it. Mr. Diamond, two weeks? Or do you need 30 additional days?

MR. DIAMOND: I have a long-scheduled trip to Japan with my wife in the latter half of December. And I apologize for that. I would like to have it done --

THE COURT: Well, 30 days and 30 days? Would that be -- or is that -- that's not going to help you any or --

MR. DIAMOND: No. It's going to give

me, effectively, two weeks --

THE COURT: Okay.

MR. DIAMOND: -- because I am leaving for Japan the 17th of December and back on January 4. So if you could set it like November 29, I

will just have that couple of weeks -- if you want me to look -- I will try -- I'll tell you what, if you would like, I will try to do it in those two weeks. And if you would be kind enough to be lenient should I need a few more weeks --

THE COURT: Sure.

MR. DIAMOND: We've all been pretty good about that. Opposing counsel and I have been -- I think gotten along very well in terms of extensions and all. So I will make every effort.

MR. MOORE: Can I have the 30th, Monday the 30th of November?

THE COURT: November? Fine. That's fine. The 30th of November. And you are departing when, Mr. Diamond?

MR. DIAMOND: I want to say it's the 17th. I am bad on dates. I think it's December 17th.

THE COURT: Well, look at it. If you need additional time, simply advise Mr. Moore. And I will tell you now that we will give you additional time.

MR. DIAMOND: All right. I'll do everything I can.

THE COURT: Because we need to -- I

mean, this needs to be dealt with right here, not ship it off to somebody else and prolong it. Because they are doing a lot of work down there, regardless of what standard you use. Let's put it that way.

All right. And I will -- I don't think you will need additional argument. I think we have got the issues laid out. And I will try to give you an opinion as quickly as I can after receiving your briefs.

I would like to get all of that together and bring this to a conclusion. It's awfully hard to pick this case up every three or four months and stay with it. So thank you. I appreciate the excellent briefs and arguments this morning.

MR. MOORE: Thank you, your Honor. We appreciate your --

THE COURT: Mr. Frye, we will recess until we can get that case back in here for an extra day.

(End of proceedings.)

C E R T I F I C A T E

STATE OF TENNESSEE :

COUNTY OF KNOX :

I, CAROLYN N. HOLTZMAN, Court Reporter and Notary Public, do hereby certify that I reported in machine shorthand the above proceedings, that the forgoing pages numbered 1 to 73 inclusive, were typed under my personal supervision and constitute a true and accurate record of the proceedings.

I further certify that I am not an attorney or counsel for any of the parties, nor an employee or relative of any attorney or counsel connected with the action, nor financially interested in the action.

Witness my hand and official seal this 4th day of November, 2009.

_____

Carolyn N. Holtzman
Court Reporter and Notary Public

My Commission Expires: 05/04/2013